

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-120689
	:	TRIAL NO. B-1102970
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ELISHA DUKES,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Elisha Dukes was charged with trafficking in cocaine, possession of cocaine, having a weapon while under a disability (“WUD”), and carrying a concealed weapon (“CCW”). He subsequently moved to suppress a gun, money, and cocaine that police had discovered on him, arguing that his initial stop by police had been illegal. The trial court denied Dukes’s motion. Dukes later pleaded no contest to the WUD and CCW counts, and also pleaded no contest to reduced charges of trafficking and possession. The court accepted Dukes’s pleas and found him guilty. It merged the trafficking and possession charges, and sentenced Dukes to consecutive terms of incarceration on the remaining counts for a total of seven-and-a-half years in prison. This appeal followed.

In his first assignment of error, Dukes claims that the trial court erred when it denied his motion to suppress. Our standard of review is two-fold. We defer to the trial court’s findings of fact provided the findings are supported by competent, credible

evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

But we review de novo the trial court's application of the law to these findings. *Id.*

Here the trial court found that police officer Charles Knapp had been patrolling a neighborhood on bicycle when he heard what appeared to be gunshots. As Knapp was bicycling toward the sound to investigate, he received a police broadcast stating that a 9-1-1 caller had reported a shooting in the area by a person "wearing all brown." It was also reported that the shooter had left the scene on foot. Dukes was wearing all brown and was in the vicinity of the reported shooting, so Knapp asked Dukes to stop. Dukes did not. A chase and struggle ensued. During the struggle, the officer felt what appeared to be a weapon in Dukes's waistband. Following a search of Dukes, officers recovered a handgun, money, and crack cocaine.

These facts were supported by competent, credible evidence. Applying these facts to the law, we hold that Knapp had had a reasonable, articulable suspicion to stop Dukes based on Dukes's proximity in time and place to the shooting, and the fact that Dukes matched the police-dispatch description of the shooter. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Bobo*, 37 Ohio St.3d 177, 524 N.E.2d 489 (1998), paragraph one of the syllabus.

Dukes contends that police had no grounds for the initial stop because the stop was based on an unreliable, anonymous tip. Here, the state presented sufficient evidence to demonstrate that the officer was justified in relying on the police dispatch. *See Maumee v. Weisner*, 87 Ohio St.3d 295, 720 N.E.2d 507 (1999). Dukes's first assignment of error is overruled.

In his second assignment of error, Dukes contends that the trial court erred when it denied his motion to withdraw his plea and to replace his appointed counsel.

Dukes claimed that he wanted to withdraw his plea because counsel had been ineffective during his motion to suppress by failing to play a recording of the 9-1-1 call that had reported the shooting. Dukes also contended that his attorney had forced him into entering the pleas because she knew the victim of another criminal matter pending against Dukes, and therefore was biased against him. The trial court thoroughly explored both arguments and found both of them to be groundless.

Overall, the record reflects that the trial court conducted a full and fair hearing on Dukes's motion and that, before ruling, considered relevant factors as set forth by this court in *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995). We therefore hold that the trial court did not abuse its discretion in denying Dukes's motion to withdraw his pleas. See *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992). This argument has no merit.

Dukes's motion to replace his appointed counsel—his fifth attorney in this case—was heard at the same time as his motion to withdraw his plea and was based on the same arguments. The trial court found these arguments to be meritless. We therefore hold that Dukes did not meet his burden to demonstrate that new counsel was warranted. *State v. Coleman*, 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988).

Dukes's second assignment of error is overruled.

In his third assignment of error, Dukes argues that the trial court abused its discretion in imposing an excessive sentence and that the court failed to make the requisite findings to support the imposition of consecutive sentences.

Dukes's sentences were within the statutory range for each offense. Regarding the length of Dukes's sentences, we presume that the trial court considered the applicable sentencing statutes before imposing sentence. See *State v. Brown*, 1st Dist. Nos. C-100309 and C-100310, 2011-Ohio-1029, ¶ 14, citing *State v. Kalish*, 120 Ohio

St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, fn 4. And there is no indication that the trial court abused its discretion in regard to the length of each sentence imposed. *See Kalish, supra*. Dukes is correct, however, that the trial court erred when it failed to make the necessary findings under R.C. 2929.14(C)(4) before imposing consecutive terms of incarceration. “Consecutive sentences imposed without the statutory findings are clearly and convincingly contrary to law and must be vacated.” *State v. Green*, 1st Dist. Nos. C-120269 and C-120270, 2013-Ohio-1508, ¶ 6. Dukes’s third assignment of error is therefore overruled in part and sustained in part.

In his fourth assignment of error, Dukes claims that his CCW and WUD counts were allied offenses of similar import. So, Dukes argues, the trial court erred when it sentenced him for both crimes. Dukes is incorrect. Under the facts of this case, Dukes necessarily had to have separately procured the gun found in his possession before he concealed it in his waistband. *See State v. Young*, 2d Dist. No. 23642, 2011-Ohio-747; *State v. West*, 8th Dist. No. 98274, 2013-Ohio-487. These were two separate acts, and the trial court correctly sentenced Dukes on both charges. *See* R.C. 2941.25(B). Dukes’s fourth assignment of error is overruled.

In sum, we vacate the consecutive terms of incarceration imposed in this case. This cause is remanded to the trial court for it to consider whether the imposition of consecutive sentences is warranted under R.C. 2929.14(C), and, if so, to make the appropriate findings. In all other respects, including the individual terms of incarceration imposed on each count, the trial court’s judgment is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

OHIO FIRST DISTRICT COURT OF APPEALS

HENDON, P.J., HILDEBRANDT and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on May 22, 2013

per order of the court _____.
Presiding Judge